Supreme Court, U.S.
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No_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

LANDA JEAN BROTHERS
Petitioner,

vs

PAUL BROTHERS
and
Alabama Department of Human Resources
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does a child alleged to be sexually abused have first and fourteenth amendment rights and a liberty interest in the outcome of domestic court proceedings between her parents?

(2) Was Petitioner deprived of custody of Lorie without due process of law in violation of the first, fourth, fifth and fourteenth amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

The Parties in this case are Paul Brothers, Lorie's father. Landa Jean Brothers, Lorie's mother. The Guardian Ad Litem for Lorie, Steven Sears and the Alabama Department of Human Resources. Only the Alabama Department of Human Resources participated in The Court of Civil Appeals and Supreme Court of Alabama. No one else filed a brief.

This same plea for liberty and protection may echo the cry of countless thousands of voiceless children and anguished protectors searching for Constitutional Sanctuary.

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A Opinion of the Alabama Supreme Court No. 1921883 (Dec. 3, 1993)

B Opinion of the Alabama Court of Civil Appeals No. 2910691 (July 23, 1993)

C Opinion on the Application for Rehearing, Court of Civil Appeals Case No.2010691 (August 27, 1993)

D Temporary Order Circuit Court of Marshall County, Alabama Case No. DR-86-200107.03 (July 30, 1992)

E Motion for Ex Parte Order and Order, Circuit Court of Marshall County, Alabama, Case No. DR-86-200107 (June 9, 1992)

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

Petitioner Landa Jean Brothers respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals and the denial of the Certiorari Review by the Supreme Court of Alabama.

OPINIONS BELOW

The Circuit Court of Marshall County, Alabama, Albertville Division,

entered an Order on June 9, 1992, upon ex parte motion of DHR removing Lorie Brothers from her mother and placing her in foster care. The Circuit Court entered a second Temporary Order after a hearing on July 30, 1992 placing Lorie with the father. A Motion to Modify the July 30, 1992 Order was filed on August 5, 1992 and denied on August 7, 1992. The Court of Civil Appeals denied the Petitioner's appeal on July 23, 1993. An application for rehearing was denied on August 27, 1993. The Supreme Court of Alabama denied Petitioner's Petition for Writ of Certiorari on December 3, 1993.

BASIS FOR JURISDICTION

The judgment of the Supreme Court of the State of Alabama was entered on December 3, 1993 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) This matter involves the following constitutional provisions and statutes.

(2) Child Abuse Prevention and Treatment Act, 88 Stat. 4, 42 U.S.C. 5101 et. Seq., as amended.

(3) Social Security Act, Part B, Title IV, 42 U.S.C. section 620 et. seq.

(4) Victims of Child Abuse Act of 1990, 104 Stat. 4792, 42 U.S.C. section 13001 et. seq.

(5) The right to assemble and to petition the government for redress of grievances; freedom of speech; freedom of choice. U.S. Const. Amend. I.

(6) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, but upon probable cause. U. S. Const. Amend. IV.

(7) No person shall . . . be deprived

of life, liberty, or property without due process of law." United States Const. Amend. V.

(8) No State shall . . . deprive any person of life, liberty, or property, without due process of law. U.S. Const. Amend. XIV

STATEMENT OF THE CASE

This highly publicized case is properly termed "a sexual abuse dispute" involving custody and visitation of a minor child, Lorie Brothers, D.O.B., July 16, 1985. Lorie has reported sexual abuse by the father since February 14, 1987, with a history of sexual abuse in her father's family and other risk factors. On June 9, 1992, Lorie made another disclosure to her mother and was taken to the hospital where she was improperly removed from her mother's custody for reporting and

placed in foster care. A July 29, 1992 hearing resulted in an Order placing Lorie in the custody of her father. The Court failed to reach the credibility of witnesses and failed to decide the matter of whether Lorie was molested. Petitioner's appeal was denied by the Court of Civil Appeals under Alabama's Ore Tenus rule. At this point, Petitioner alleged that this was not the proper standard of review to protect Lorie and that the Court should have granted her request for custody with the father having supervised visitation at the Department of Human Resources. Petitioner also alleged on appeal a denial of due process in being limited to the period of time from May 6 to July 29, 1992 when presenting her side of the case; that she was denied due process of

law when the court failed to allow the evidence that the therapist used to base her opinion that Lorie wasn't molested and should be taken from her mother and given to her father. Lorie's interests weren't protected and Petitioner was deprived of custody without due process of law. On December 3, 1993, the Alabama Supreme Court denied Certiorari review without Opinion. (Appendix A) Petitioner now files this her Petition for Writ of Certiorari to this Court, Pro Se.

THE PROCEEDINGS IN THE COURT BELOW

On October 22, 1983, Landa Jean Brothers and Paul Brothers were married in Marshall County, Alabama. On July 16, 1985, Lorie Christine Brothers was born. On July 23, 1986 the parties were divorced with the mother having custody subject to reasonable visitation of the

father. On February 14, 1987 Lorie began reporting to her mother incidents of sexual abuse by the father and continued to report other incidents through June 5, 1988. On August 1, 1988 a Contempt hearing was held resulting in the mother being incarcerated in the Marshall County Jail for 7 months for refusal to allow visitation or reveal Lorie's whereabouts. Lorie was found on March 2, 1989 and returned to Marshall County, the mother was released from jail. Hearings were held resulting in a Temporary Order on May 29, 1990 stating that DHR was to examine relative resources so that Lorie's custody could be given to a relative. The mother appealed stating her prima facie right to custody. Lorie remained in the custody of the Marshall County Department of Human Resources until

January 23, 1991 when her custody was returned to her mother with the father having standard visitation. Lorie continued to report incidents of sexual abuse by her father resulting in several more proceedings. On August 27, 1991, at the request of the mother, Lorie was given a Guardian Ad Litem and referred to the National Children's Advocacy Center for further sexual abuse evaluation after disclosure to her therapist, Dr. Janice Martin. A hearing was held on May 6, 1992 after the Guardian Ad Litem petitioned the Court to change custody from the mother to the father. The mother's motion to stop the father's visitation remained pending from the August 27, 1991 hearing but the Court proceeded with the GAL's part of the case. The mother's side of the case was to be rescheduled.

After a visit with her father on the week-end of June 7, 1992, Lorie was taken to the hospital because she was having vaginal pain, could not urinate and was alleging that her daddy made her hurt. Lorie was removed from her mother's custody by Court Order after DHR faxed an Ex Parte Motion to the Trial Judge. The Motion alleged that Lorie should be removed from her mother's custody and stated as grounds for removal, "the testimony of May 6, 1992; the allegation that the mother was failing to take Lorie to counseling at the Children's Advocacy Center; that Lorie had reported that her mother sold items of furniture within the past few days and the Intervenor/DHR is concerned about the "possibility" of the mother leaving the jurisdiction of the Court with Lorie; that despite orders of the

Court, the mother continues to make allegations of sexual and physical abuse against the father and on or about the 8th day of June, 1992 did file additional pleadings with the Court again alleging such abuse, and the mother has on this date notified DHR that she is again having Lorie examined for sexual abuse by the father." DHR alleged that this was harmful to Lorie's best interest and that an immediate order should be issued by the Court removing Lorie from her mother.

A hearing was set for July 29, 1992 with the removal order being combined with the pending proceedings for the mother to present her part of the case. No evidence was presented in support of DHR's Ex Parte Motion. It should also be noted that the mother was under a Ten Thousand Dollar bond and the allegation

of the possibility that she might take Lorie and leave was addressed before the bond was made on January 23, 1991. During the July 29th hearing, the mother was limited to the period of time from May 6, 1992 to July 29, 1992. The Trial Court denied the mother access to records that Ms. Hoffman, the Children's Advocacy Center therapist, used to base her opinion that Lorie was not molested. Lorie was placed in the temporary care, custody and control of her father with the mother having supervised visitation two hours per week at the Department of Human Resources. The Trial Court abdicated it's power as trier of fact and failed to reach the issue of whether or not Lorie was sexually abused, the credibility of witnesses was not decided. The Temporary Order of July 30,

1992 also did not discredit the mother nor adjudicate that she was unfit in any way. The mother was denied proper Appellate access because she was not told what she was required to defend when deprived of custody. The GAL took a prejudicial attitude towards the mother, failed to marshal the evidence and didn't participate in the appeals.

The Alabama Court of Civil Appeals issued an Order on July 23, 1993 (Appendix "B") and stating, in relevant part that, "Because of the seriousness of the allegations and assertions made by the mother in this appeal, we elect to treat the July 31, 1992, order as a temporary custody award. "The record reflects that the trial court has **attempted** to adjudicate a very difficult custody battle to accomplish a result which is in the best interests of the

minor child. DHR contends that what the trial court did was in the best interest of the child. As a general rule, "where evidence is presented ore tenus, a child custody determination is committed to the sound discretion of the trial court, and will not be reversed on appeal absent a finding that the determination is so poorly supported by the evidence as to be plainly and palpably wrong." Ex Parte Walters, 580 So. 2d 1352, 1353 (Ala. 1991). "A recitation of the evidence, accusations, reports, and testimony before the trial court would serve no useful purpose in this matter." An application for rehearing was timely filed and denied on August 27, 1993 in addition to all motions. (Appendix C) A writ of Certiorari was timely filed in the Alabama Supreme Court and denied without opinion on December 3, 1993.

REASONS FOR GRANTING THE WRIT

I. LORIE WAS NOT AFFORDED A LIBERTY INTEREST IN THE OUTCOME OF THE DOMESTIC COURT PROCEEDINGS IN VIOLATION OF THE FOURTEENTH AMENDMENT AND FIRST AMENDMENT ACCESS RIGHTS.

The Trial Court failed to reach the issue of whether Lorie was molested by her father, failed to reach the credibility of witnesses, but changed custody from the mother to the alleged perpetrator. (Appendix D)

The reaction to this sexual abuse dispute is typical of the "backlash" against mothers who try to protect their children described best by "Congressman Major Owens." Congressman Owens sponsored the landmark Child Abuse, Domestic Violence, Adoption and Family Services Act. (42 U.S.C. 5101 et. seq.) He says, "When Ms. Joseph and her mother

protested, the courts labeled them "delusional" and threatened to give the father permanent custody if Ms. Joseph attempted to take the child to a hospital for treatment." "Charges like those brought forth by Ms. Curtis and Ms. Joseph are just a few of several examples where it appears that the courts may be exacerbating the high incidence of sexual abuse of children, and the number of such cases is skyrocketing." "Our courts are in effect helping abusive parents to further victimize their children, leaving them emotionally and physically scarred for life. This trend must be stopped before more helpless children are turned over to parents who may be sexual terrorists."

Ignoring or mistreating child sexual abuse is tantamount to allowing

an untreated cancer to grow in our society. The seriousness of the problem is underscored by reports of 2.5 million suspected cases of child abuse and neglect and more than 1,200 confirmed fatalities. Cold statistics cannot begin to dramatize the torment and misery caused by the horrendous acts committed against these vulnerable children-our Nation's most precious resource. Field Hearing on Child Abuse, Monday, April 20, 1992, House of Representatives, Subcommittee on Select Education of the Committee on Education and Labor House of Representatives, 102nd Congress, Serial No. 102-119, U.S. Government Printing Office, Washington, 1992.(page 1)

In LaShawn A. by Moore v Kelly, 900 F. 2d 1319 (D.C. Cir. 1993), the Court found that the challenged action and non-

actions of the DHS violated two federal statutes: the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. section 620-627 and section 670-79, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101-5106. The Court held the defendants liable under 42 U.S.C. section 1983 for both the constitutional and federal statutory violations. District of Columbia's Prevention of Child Abuse and Neglect Act creates private right of action for children in foster care system and for children reported to have been abused or neglected but not yet in the District's custody, under which children who remained subject to abuse and neglect at the hands of their parents and guardians or who languished in inappropriate foster care placements could seek injunctive relief against District

officials. Alabama's comparable statute is 26-14-1 et. seq. Code of Alabama. In order to qualify for such assistance, states "must" comply with certain statutory requirements aimed at assuring that proper reporting, investigative, personnel, health care, and legal programs and procedures exist to protect and promote the interests of abused and neglected children. 42 U.S.C. 5106a(b).

Accordingly, the statutes both federal and state are of mandatory application. Mandatory statutory mandates must override Alabama's Ore Tenus Rule where abuse of children is alleged to protect children as Congress intended and comply with federal laws. Most commonly state fetters official discretion for due process analysis by two-step process: first, state establishes substantive predicates to

govern official decision making and these are particularized standards or criteria to guide state's decision makers and next, state requires in explicitly mandatory language that if substantive predicates are met, then particular outcome must follow. Connor v Sakai, 994 F. 2d 1408. (Hawaii, 1993). U.S.C.A. Const. Amends. 5, 14. Smith v Sumner, 994 F. 2d 1401, (Nev. 1993). To create liberty interest recognizable under fourteenth amendment, state must do more than just create strict procedures that decision makers must follow; state must also provide particularized standards or criteria to guide decision maker. U.S.C.A. Const. Amends. 5, 14 Mitchell v Sheriff Dept., Lubbock County, Tex. 995 F. 2d 60, (Tex. 1993). The CAPTA is cast in mandatory not precatory terms and is sufficiently

specific and definite to qualify as an enforceable right. See Wilder v Virginia Hosp. Ass'n110 S.Ct. 2510, 2517-18 (1990).

As this Court applied Congressional intent to the PKPA in Thompson v Thompson 108 S. Ct. 513 (1988), your Petitioner respectfully urges this Honorable Court to apply the same analogy with regard to Congressional intent to the Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101-5106. "We examine initially the context of the CAPTA with an eye toward determining Congress' perception of the law that it was shaping or reshaping." "In essence, the CAPTA would impose on states a Federal duty."

A New York Supreme Court case, In the Matter of Jamie "TT" vs Chemung County Department of Social Services No.

66712, Supreme Court, Appellate Division, 3rd Dept., N.Y.S. 2d, 1993 WL 238879, "uses language" descriptive of a child's right to protection from "alleged"sexual abuse. In Jamie the Court noted, "the risk of an erroneous factual determination rejecting Jamies's claim of sexual abuse would be restoration of the custodial rights of the person accused of molesting her, a result we characterized in Matter of Linda C. (86 A.D. 2d 356, 361) as "approaching the level of absolute abhorrence and the Court of Appeals characterized as "disastrous." "The interest in protecting children from the infliction of serious physical harm or sexual molestation by a parent is the apotheosis of the State's parens patriae role." We would be callously ignoring the realities of Jamie's plight during

the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process. "To the extent that Family Court required corroboration of the 14-year-old child's sworn testimony in the form of something "corollary", it clearly erred, for no such corroboration is required."

The instant case is different from Jamie in that Lorie's statements of abuse have been consistently defined and documented in the record and Lorie has been living with her alleged abuser since July 31, 1992 without protection. In Jamie the mother held a conflicting opinion or did not believe Jamie. Lorie's mother has consistently met her legal and moral obligations to Lorie and

has tried desperately to protect her over the past 7 years.

This Court has recognized that in the absence of a "clearly expressed" intention to the contrary, the language of the statue itself is ordinarily "conclusive." See, e.g., Consumer Product Comm'n v GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Quoting Ankenbrandt v Richards 112 S. Ct. 2206 (1992). In Ankenbrandt this Court noted, at 2221, and footnote 8, "the expansion in recent years of federal law in the domestic relations area." See , e.g, Victims of Child Abuse Act of 1990, 104 Stat. 4792, 42 U.S.C. section 13001 et seq; Adoption Assistance and Child Welfare Act of 1980; 94 Stat. 500, 42 U.S.C. sections 620-628, 670-679a; Child Abuse Prevention and Treatment and

Adoption Reform Act of 1978, 92 Stat. 205, 42 U.S.C. sections 5111 et seq; Child Abuse Prevention and Treatment Act, 88 Stat. 4, 42 U.S.C. section 5101 et seq.

Lorie's removal from her mother (Appendix "E") without probable cause resulted in fourth, fifth, and fourteenth amendment violations. The State Department . . . **"shall in no case"** contravene the Social Security Act, and the rules and regulations promulgated thereunder. Code of Alabama 38-2-5. The CAPTA is incorporated into Part B of Title IV of the Social Security Act, 42 U.S.C. 620 et seq.

The Alabama Court of Civil Appeals' application of the Ore Tenus rule prohibited proper consideration of Lorie's allegations of sexual abuse by her father. Alabama's Ore Tenus rule is

improper in cases where there are allegations of child abuse. That Court reviewed the appeal because of the seriousness of the allegations and assertions. It also states, "The record reflects that the trial court has attempted to adjudicate a very difficult custody battle to accomplish a result which is in the best interests of the minor child." This is not a proper standard of review where a child's life and future hang in the balance and applying this standard of review is not in the public interest.

Your Petitioner respectfully urges that in cases of child abuse mandatory provisions and a child's protection should not be bound down by legal technicalities, res judicata, the passage of time, a finding of not guilty in a criminal action, etc. Child abuse

must be looked at in the totality of circumstances and applying reliable techniques generally accepted within the scientific community such as the "accomodation syndrome" and "Law & Psychology Review Vol. 1, 15:277.

When the custody of minor children is an issue, the court, as parens patriae, has not only the power, but the duty to act in the best interest of the child. The form in which the action is initiated, as a petition for habeas corpus or otherwise, is irrelevant, the welfare of minors is not to be determined by legal technicalities or conduct of the parties which has no bearing on the welfare of the child. Winter v Crowley 374 F. 2d 317, 320 (D.C. Cir. 1967). In other words, mandatory provisions of federal child protection laws should have the same

unflagging application as the "Writ of Habeas Corpus." The Honorable Justice Hugo L. Black said it this way, "Habeas Corpus is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of the individual against erosion of their right to be free from wrongful restraints upon their liberty. (Citation omitted).

To achieve the purpose of mandatory federal child protection laws, this same theory must be applied where there are allegations of child abuse that threaten a child's liberty and the right to be free from harm. The Alabama Court of Civil Appeals noted the "seriousness of the allegations." Alabama's Ore Tenus Rule is of improper application in this case. The mother's request to retain

custody of Lorie with the father having strictly supervised visits at the Department of Human Resources would have served the child under the "best interest standard" after mandatory application of federal statutes.

II. THE PETITIONER WAS DEPRIVED OF CUSTODY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS.

Petitioner re-states Issue I above as if set out verbatim here and further states:

On April 29, 1987 Lorie was taken to Dr. John Packard at the request of Marshall County DHR, after Lorie reported that her daddy hurt her in the vaginal area. Her genitalia appeared normal; she would answer any question except those about her genital area, those she refused to answer. Lorie was

taken from the mother by Court Order on October 2, 1987 and sent on a visit with her father while in DHR custody and returned to her mother on October 5, 1987. Lorie was taken to B & A Hospital who filed a child abuse report stating her vaginal opening was 1 CM and that she became hysterical when asked if she wanted to see her father. On June 5, 1988 Lorie had been on a visit with her father and complained of sexual abuse. The June 5, 1988 report notes the vaginal opening into the vagina is about 5 mms across. The report notes that Lorie told her mother that her father picked her up about 1:30, took her to his trailer and there the child said that the father rubbed her with his penis from behind over her genitalia with the tip of his penis coming out anterior. She said stuff came out all

over her. "On questioning again after examining the child, the child did say that she was alone with her daddy at the trailer before they went swimming. I asked if the daddy said he was going to do anything to her mother and the child related that he said he would shoot the mother." Lorie was allowed to go on visits with her father while in foster care and in December of 1990, Lorie disclosed to her foster mother. "The foster mother asked Lorie to tell her where her father washed. Lorie said that he washed her "vagina and butt real good." The foster mother said Lorie did not mention any other body parts. The foster mother asked her if she was sitting down how could her father have washed her bottom? Lorie said, "Like this," and she straddled her legs.

Dr. Martin's report to DHR stated,

"While interviewing Lorie, age 5, 5/30/91, on feelings specifically things that make us nervous, Lorie drew a vertical and a horizontal stick person. She spontaneously scribbled in genitalia on vertical saying dad's penis. She then stated dad licks her vagina and drew lines that show his mouth to her vagina and lines going from his penis to her vagina-showing what he touched her with and where on the bodies.

Lorie was ordered to be evaluated by the National Children's Advocacy Center and a report was done by Ms. Charlotte Hoffman on March 19, 1992 and submitted on May 6, 1992. The mother was not allowed to participate in giving any information to Ms. Hoffman. Ms. Hoffman's Attorney sought to have her subpoena quashed and Court denied the motion but limited the mother's

examination to the period since the May 6, 1992 hearing and refused the mother access to the records used in the evaluation. Going into Ms Hoffman's first therapy session with Lorie, DHR's Attorney Johnson objects and Court sustained. Ms Brothers (Pro Se) says, "I believe I went into the issues of the welfare of the child and anything not previously submitted to the Court I may do so with the issue of the best interest of the child and cases I had stated before on a motion. Britt v Britt and Anonymous v Anonymous. I'm sorry I don't understand. Can I go into the first session? What I am saying this was not covered and he keeps objecting on going going back into it. I need a point of clarification. Court: "As a point of clarification, you may not be repetitive with regards to

evidence which could or should have been brought at that time. I understand that you seek to impeach this witness by calling and recalling. You may introduce evidence you want to bring out that is new that you didn't have an opportunity to bring out the last time. You can bring out evidence that occurred after the date of the hearing. You can bring out evidence that was secreted from you if you find that it was secreted for some reason and you found out about it now. We are not going back into the sessions that we have already been into and all of that evidence. That is already over. I have that written down. I have taken notes on it. You Honor, I would like to make a specific objection for the record of the fact that Ms. Hoffman's notes were not brought to Court for the record for

appeal purposes.

Although Ms. Hoffman perfected a time-line from before Lorie was born and the report was addressed on May 6, 1992, by the other side, the mother was limited to the period between May 6, 1992 and July 29, 1992. Ms. Hoffman's report was also an issue on the Motion for Ex Parte Order that Judge Rochester said was before the Court at this hearing. Ms. Hoffman did not know the dates of the mother's psychological evaluations and said they all concur. The mother contended on appeal that "A party is given wide latitude in cross-examination to test a witnesses' partiality, bias or interest. Cross-examination is not limited to matters addressed in witness' direct testimony but may concern all matters relevant and material to every issue of

the action. Perry v Brakefield 534 So. 2d 602 (Ala. 1988). Lee v Lee 337 So. 2d 372 (Ala. Civ. App. 1976); Britt v Britt 281 Ala. 217, 201 So. 2d 54 (1967); Annonymous v Anonymous 277 Ala. 634, 173 So. 2d 797 (1965). Every witness must be subject to fair and complete examination and cross-examination under oath upon any material and relevant evidence. Lawson v Jennings 52 Ala. App. 582, 296 So. 176 (1974). Opinion testimony is proper, assuming witness is determined to be qualifed, and assuming that witness details facts upon which his conclusion is based. McKelvey v Darnell 587 So. 2d 980 (1991). In Alabama, a party is entitled to a through and sifting cross-examination of the witnesses against him. Riley v City of Huntsville 379 So. 2d 557 (1980).

Court of Civil Appeals and the Alabama Supreme Court failed to address this issue and denied proper access to this due process claim. The Trial Court's decision to deny the mother access to the records to prove her case denied due process and first amendment access to the Court and the Appellate Courts. "Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." Bell v Milwaukee, 746 F. 2d 1205, 1260-63 (7th Cir. 1984) Withholding evidence that would allow an individual to prove his claim violates right of access. Ryland v Shapiro,708 F. 2d 967, 973 (5th Cir. 1983). In Chambers v Baltimore & Ohio Railroad, 207 U.S. 142 (1907), the court viewed the right of access to courts as one of the privileges and immunities accorded

under Article IV of the Constitution, other courts have determined the right to also be grounded in the first amendment right to petition and in the due process clause of the fourteenth amendment. The fourteenth amendment to the United States Constitution provides that "no State shall . . . deprive a person of life, liberty or property without due process of law." U.S. Const. amend. XIV. Board of Regents v Roth, 408 U.S. 564, 571 (1972). Chrissy F. II, 925 F. 2d 844 (5th Cir. 1991).

Ms. Hoffman's signature on her report shows she is not a licensed psychologist, just a counselor. Ms. Hoffman diagnosed the mother in violation of Code of Alabama, 34-26-1. Ms. Hoffman used a 1985 psychological evaluation done while the mother was pregnant with Lorie and as

noted "before Lorie was born". MMPI testing is only valid for a period of six months and the label Ms. Hoffman applied to the mother had not be used since the 1980's. Lorie did not have a child protection team at the Children's Center. Ms. Hoffman testified that the report was hers alone. She also admitted to a problem with her own mother. Apparently Ms. Hoffman blindly accepted DHR's reports as not true since DHR had said they were unfounded. The report is conflicting in that she states, "Lorie has also, however, disclosed questionable sexual behavior by Mr. Brothers to Dr. Martin and to her foster mother. She disclosed detailed sexual abuse to Dr. Martin and on the same day recanted after seeing her father drive by the therapists office." "She also told her foster mother that

her father washed her "vagina and butt real good" and demonstrated how he did this. Mr. Brothers has also admitted to sleeping in his underwear with Lorie. This is disconcerting considering the attention his behavior with her has received" Ms. Hoffman stated.

Having an expert who is prejudiced against incest claims or is unqualified or inexperienced in child sexual molestation cases will seriously endanger a child since often there is no physical evidence or corroborating witnesses. Keating, Children in Incestous Relationships: The Forgotten Victims, 34 Loyola L. Rev. 111 (1988) at 119.

Ms. Hoffman's report, on it's face, does not meet any standard of reliable technique generally accepted within the scientific community. She ignored the

most accepted scientific theories regarding allegations of child sexual abuse including the "accomodation syndrome." The accomodation syndrome is properly addressed in Law & Psychology Review Vol. 1, 15:277; Allison v State 346 S.E. 380 (Ga. App. 1986); People v Bowker 249 Cal. Rptr. 886 (Cal. App. 4 Dist. 1988). By restricting the expert to generally accepted scientific techniques, the factfinder is protected from being misled by the "aura of infallability" of unproven and ultimately unscientific methods. People v McDonald 37 Cal. 3rd 351, 208 Cal. Rptr. 236, 690 P. 2d 709).

On June 9, 1992 Lorie was taken to the Jackson County Hospital after she reported sexual abuse by the father. The deposition of Dr. Rebecca Gerlach stated, "Introitus, mildly enlarged for

what is expected for a child this age." "The hymenal ring in the anterior/posterior access was approximately one half to one centimeter in size." There was a slight enlargement of the hymenal ring." "I would make the recommendation that someone that has more expertise in this area be consulted." I could only offer again the many things that could cause that and could tell the worker of that night, Ivan Roberts, that this was atypical or not normal for a six-year-old. "I have recommended that she be evaluated by a doctor that is more qualified in sexual abuse, sexual molestation, and pediatrics and sexual training. I recommended the team of Dr. Mulchahey and Dr. Haines.

Lorie told the worker what happened to cause the physical findings. Ms.

Roberts testified that, "She said that they were in the bathroom at her Aunt Audrey's house the previous weekend. That she was wearing her T-shirt and gown and panties and daddy come into the bathroom and had taken the panties off and throwed them over on the commode. Had her to lay down and put his finger in her and he got up and left and told her not to tell anyone."

Ms. Hoffman was not qualified to evaluate the medical evidence and she testified that the report was just hers, that Lorie did not have a Child Protection Team. This case does not reach the issue of the admissibility of the expert testimony. It is admitted and was considered at all stages of the Trial and appeal. The question here is "methodology" and correctness of Opinion testimony. Petitioner contends that

expert testimony is critical in cases of child abuse and any leeway should be directed towards child protection.

This Court, Justice Harry A. Blackmun in addressing Daubert v Merrell Dow Pharmaceuticals, 92-103, stated, "Judges should consider such factors as whether a theory or technique can be or has been tested, whether it has been subjected to peer review or publication, general acceptance within the scientific community. But ultimately, he wrote, the focus "must be solely on principles and methodology not on the conclusions that they generate." Quoting The National Law Journal Monday, July 12, 1993.

Accordingly the "accomodation syndrome" has been tested and repeatedly approved in child sexual abuse cases. Ms. Hoffman's methodology doesn't meet this standard nor does it hold any

reason or logic and it's apparent that this is the only conceivable evidence that could of been used to change custody and deny the mother's request to stop the father's visitation. It was also addressed as an issue in the Ex Parte Motion to remove Lorie from her mother's custody on June 9, 1992.

In Allison v State 346 S.E. 2d 380 (Ga. App. 1986), expert testimony regarding "child sexual abuse accomodation syndrome," a pattern of behavior allegedly typically exhibited by children who are victims of sexual abuse, was admissible in child molestation prosecution in which defendant denied allegations of child abuse and asserted that the victim was coached into creating her story.

Lorie's statements to her mother were apparently not properly considered.

A child alleged to be sexually abused made statements to her mother and statements were admissible, therefore the statements Lorie made to her mother should have been considered reliable and corroborating in light of the other evidence in the case. Morgan v Foretich, 846 F. 2d 941, 948 (C4A 1988). Idaho v Wright 110 S. Ct. 3139 (1990), at 3150.

Although your Petitioner respectfully urges an application of Jamie TT, id., and negating the need for corroboration in the instant case, it appears that the Trial Court denied the mother custody because she was not believed about the statements Lorie had made to her.

Admittedly, the search for truth in child sexual abuse cases is understandably difficult as the Court of

Civil Appeals stated. However, we must not in our zeal to find an answer to this mystery, override clear evidentiary guidelines or potentially "chill" a mother's genuine efforts to protect her child from sexual abuse for fear that if she is unable ultimately to convince a trial judge of the accused parent's guilt she most assuredly will lose her child. As this Court Opined in Moore v City of East Cleveland 431 U.S. 494, 503 (1977), "Providing constitutional shelter for a parent-child relationship simply reflects the realization that individuals draw much of their emotional enrichment from such relationships and that the sanctity of family relationships is "deeply rooted in this Nation's history." The constitutional right to be free of unwarranted governmental interference with the

integrity of one's family is a firmly and clearly established constitutional principle. Stanley v Illinois, 405 U.S. 645, 651 (1972); Pierce v Society of Sisters, 268 U.S. 510 (1923); Meyer v Nebraska, 262 U.S. 390 (1923); Gary W. v State of Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976). Additionally, the associated, similarly well-established constitutional right involved is the "least restrictive means" doctrine. This doctrine provides that when a a state impinges on fundamental constitutional rights, it must do so in a manner least restrictive to the individual. See Shelton v Tucker, 364 U.S. 479, 488 (1960); Little v Streater, 452 U.S. 1, 101 S. Ct. 2202, 68 L.Ed.2d 627 (1981); Lassiter v Department of Social Services 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed 2d 640 (1981); Santosky v

Kramer 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed 2d 599 (1982). A child should not be removed from a protective parent making the choice to report what the law says she may report, for believing her child or taking her child to a doctor. Lorie should not have been removed from her mother on June 9, 1992. Lorie was not in imminent danger from anyone but her father and was removed without probable cause in violation of the fourth and fourteenth amendment and fundamental constitutional rights under federal regulatory schemes. No state interest was served by Lorie's removal from her protective parent. New Jersey v T.L.O. 469 U.S. 325 (1985); Monell v Department of Social Services 436 U.S. 658 (1978).

After Lorie's removal from her mother, she was sent on a two week visit

with her father. After the visit discharge was noticed on Lorie's panties by the foster mother.

Empirical evidence shows that sexual abuse allegations are rarely fabricated. According to a major national study conducted by the American Bar Association and the Association of Family and Conciliation Courts, more than 85 percent of allegations are raised in good faith. Because sexual abuse allegations are so often valid, the Association of Family and Conciliation Courts has issued an official recommendation that judges should be careful to base decisions on objective evaluations, not on incorrect assumptions or biases. Sexual Abuse Allegations in Custody and Visitation Cases (E.B. Nicholson & J. Bulkley, eds.) American Bar Association, National

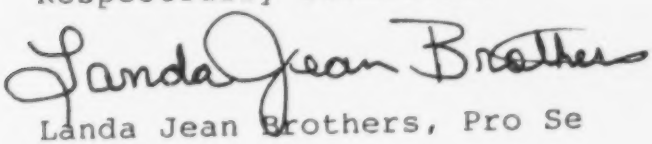
Legal Resource Center for Child Advocacy and Protection.(Feb., 1988). Courts may also hesitate to credit allegations of child sexual abuse when the child recants his or her story. However, experts note that denying the allegations is a "normal" phase for children undergoing sexual abuse. Nicholson, "How Can I Tell If This Child Is Telling The Truth?" paper distributed at the National Association of Women Judges Twelfth Annual Conference, Oct., 1990, citing, Sgroi, A Handbook of Clinical Intervention in Child Sexual Abuse (1982). Children may recant because they fear retaliation from the abuser, or because they want to somehow "erase" the abuse.

Your Petitioner was deprived of custody without due process of law and denied appropriate protection orders.

CONCLUSION

The Petition should be granted.

Respectfully submitted,



Landa Jean Brothers, Pro Se

DATED: February 24, 1994

APPENDIX "A"

NO. 1921883

IN THE SUPREME COURT OF ALABAMA

LANDA JEAN BROTHERS, Petitioner-Appellant,	)	S.C. NO. 15905
	)	Civil Appeals NO. 2910691
vs	)	
	)	Original Case
PAUL BROTHERS Respondent-Appellee.	)	DR-86-200107.03
	)	HON. JOHN E. ROCHESTER
	)	Judge

CERTIFICATE OF JUDGMENT

Writ Denied

SHORES, J. - Maddox, Almon, Steagall and Ingram, JJ., concur.

DATED: December 3, 1993

/s/ Robert G. Esdale

Clerk of the Above-entitled Court

APPENDIX "B"

IN THE ALABAMA COURT OF CIVIL APPEALS

LANDA JEAN BROTHERS	)	2910691
Appellant	)	Original Case
vs.	)	DR86-200107.03
	)	
PAUL BROTHERS	)	JUDGMENT
Appellee	)	ON APPEAL

PER CURIAM

This case involves a long-running, litigious battle between the mother and father over custody and visitation of their minor child. The mother appeals from a custody order entered on July 31, 1992. Her post-judgment motion was denied on August 7, 1992, and notice of appeal was filed on September 9, 1992.

Because of the seriousness of the allegations and assertions made by the mother in this appeal, we elect to treat the July 31, 1992, order as a temporary custody award, which, in Sims v Sims 515 So. 2d 1 (Ala. Civ. App. 1987), this court held may be reviewed by appeal.

Custody of the minor child was removed from the mother by the trial

court on June 9, 1992, and awarded to DHR. The trial court's order of July 31, 1992, changed physical custody from DHR and granted "the temporary care, custody, and control" of the minor child to the father. The mother appeals from that order, contending that the trial court committed an abuse of discretion and failed to apply the proper burden of proof.

The record reflects that the trial court has attempted to adjudicate a very difficult custody battle to accomplish a result which is in the best interests of the minor child. DHR contends that what the trial court did was in the best interest of the child. As a general rule, "where evidence is presented ore tenus, a child custody determination is committed to the sound discretion of the trial court, and will not be reversed on appeal absent a finding that the

determination is so poorly supported by the evidence as to be plainly and palpably wrong." Ex Parte Walters 580 So. 2d 1352, 1353 (Ala. 1991). Also, the father has a prima facie right to custody of his child as against DHR. Ex Parte Terry 494 So. 2d 628 (Ala. 1986).

Recitation of evidence, accusations reports and testimony before the trial court would serve no useful purpose in this matter. After reviewing the record we cannot hold that the trial court's determination was plainly and palpably wrong. All pending motions before this court in this matter are denied. The judgment of the trial court is affirmed. All the judges concur. July 23, 1993.

/s/ John H. Wilkerson, Jr.

Clerk of the Above-entitled Court

APPENDIX "C"

IN THE ALABAMA COURT OF CIVIL APPEALS

LANDA JEAN BROTHERS)

Appellant) Re: 2910691

vs)

PAUL BROTHERS)

Appellee)

APPLICATION FOR REHEARING

Application for Rehearing Denied.

All pending Motions denied.

DATED: August 27, 1993

/s/ John H. Wilkerson, Jr.

Clerk of the Aboved-entitled Court

APPENDIX "D"

IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

PAUL BROTHERS, Plaintiff	)	
vs	)	Circuit Court
	)	Case No.
LANDA JEAN BROTHERS Defendant	)	DR-86-200107.03

TEMPORARY ORDER

Pending a final adjudication of this matter the Court Orders as follows:

1. Paul Brothers shall have the temporary care, custody and control of Lorie Brothers.

2. Jean Brothers shall have the right to visitation with Lorie 2 hours every Wednesday at a county Department of Human Resources.

7. This case shall continue to be supervised by the Department of Human Resources. Dated : July 30, 1992.

Judge John E. Rochester

Specially Sitting

APPENDIX "E"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, ALABAMA

PAUL BROTHERS Plaintiff	)	
vs	)	DR-86-200107.03
LANDA JEAN BROTHERS Defendant	)	
STATE DEPT. OF HUMAN RESOURCES, Intervenor	)	

MOTION FOR EX PARTE ORDER
AND ORDER

Now comes Intervenor and moves the Court for an immediate ex parte order authorizing DHR to take Lorie Brothers into custody and as grounds therefore states as follows:

1. Intervenor requests that the Court consider testimony taken in open court on May 6, 1992.

2. Intervenor avers that Defendant is now failing to continue Lorie's counseling at the Children's Advocacy Center.

3. That Lorie has reported that her mother, the Defendant, has sold items of

furniture within the past few days and Intervenor is concerned about the possibility of the Defendant leaving the jurisdiction of the Court with Lorie.

4. Despite the orders of the Court, the Defendant continues to make allegations of sexual and physical abuse against the Plaintiff and on the 8th day of June, 1992 did file additional pleadings with the Court again alleging such abuse, and the Defendant has on this date notified Jackson County Department of Human Resources that she is again having Lorie examined for sexual abuse by the Plaintiff at Jackson County Hospital.

WHEREFORE, Intervenor avers that continued custody of Lorie with the Defendant is immediately harmful to Lorie's best interest and that an immediate order should be ordered by the Court for the Department of Human Resources to take Lorie into custody

pending further orders of the Court.

ORDER ON EX PARTE MOTION

The foregoing motion having been presented to the Court and the Court having considered the matters as set out therein, and particularly the testimony taken as set out in said motion and the recent motion which has been filed by the guardian ad litem, it is hereby ordered as follows:

1. That DHR is authorized, allowed, and ordered to take Lorie Brothers into custody pending a further hearing in this cause and place her in foster care.

3. This cause is hereby set for hearing on July 29, 1992, at 10:00 to review this order and to conclude the testimony which was started on May 6, 1992

DATED: June 9, 1992, 22:09 fax from Clay County Courthouse.

John E. Rochester, Circuit Judge